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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 475

GEORGE JONES, JR., *Petitioner,*

v.

JESSE VICTOR HOPPER, *et al., Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, AMICUS CURIAE, IN SUPPORT OF PETITION

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The American Association of University Professors appears *amicus,* with consent of all parties, in support of the petition.

INTEREST OF AMICUS

Established in 1915, the American Association of University Professors ("AAUP") is the national professional organization of teachers and research scholars in all disciplines at accredited colleges and universities in the United States. Wth approximately

90,000 members affiliated through nearly 1,000 chapters, the Association represents about 30% of full time faculty in accredited institutions of higher education. The nature and history of the Association's long concern with laws or litigation which jeopardize academic freedom have been set forth in detail in its brief *amicus* in this Court in *Keyishian* v. *Board of Regents,* 385 U.S. 589 (1967).

The interest of the Association in this litigation proceeds directly from the Association's concern for the professional security of members of the teaching profession and the protection of academic freedom. A significant proportion of all college teachers, including of course many members of the AAUP, are employed by public universities under annual or term contracts which are subject to periodic renewal. Protection against discriminatory nonrenewal of such contracts on grounds forbidden by the First Amendment is necessarily of vital concern to the Association for precisely the same reason that it has been of equal concern to this Court. As the Court observed in *Sweezy* v. *New Hampshire,* 354 U.S. 234, 250 (1957):

> The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation.

And, again, in *Keyishian* v. *Board of Regents,* 385 U.S. 589, 603 (1967):

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers

> concerned. That is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.

In recognition of the essentiality of this commitment, the 1940 *Statement of Principles on Academic Freedom and Tenure,* developed jointly by the Association of American Colleges and the AAUP, and endorsed by over sixty leading educational organizations and learned societies, specifically emphasizes that: "During the probationary [i.e., the term contract] period a teacher should have the academic freedom that all other members of the faculty have." 54 *AAUP Bull.* 384, 385 (1968).

The instant case is believed to raise a question of discriminatory nonrenewal exactly within our shared concern for academic freedom and the First Amendment.

QUESTION PRESENTED

Whether a claim alleging discriminatory nonrenewal of the contract of a state university faculty member in violation of the First and Fourteenth Amendments fails to state a cause of action under 42 U.S.C. § 1983 (the Civil Rights Act of 1871), for lack of a sufficient "property" interest or other substantial "expectancy."

STATEMENT OF THE CASE

On June 1, 1966, Associate Professor George Jones, Jr. filed a complaint against Respondents under 28 U.S.C. §§ 1331 and 1343(3), and 42 U.S.C. § 1983, seeking damages resulting from Respondents' alleged discriminatory nonrenewal of his contract. The complaint

alleged that Professor Jones' public university employment had been terminated solely because of certain oral and written statements all of which were set forth in the complaint in specific factual detail and all of which were alleged to be fully protected against such action under the First and Fourteenth Amendments.

Respondents filed a Motion to Dismiss which did not challenge or deny Plaintiff's allegations that the utterances set forth in the complaint were protected by the First and Fourteenth Amendments and that Respondents' disapproval of these utterances was the sole reason for the termination of his public employment. Rather, the Motion to Dismiss met these issues by asserting:

> Plaintiff has no federally protected constitutional rights to the renewal of his contract of employment. As a corollary thereto, Defendants have the right to refuse to renew an employment contract *for any reason,* where there were no rights of tenure as in the instant case. [Emphasis added.]

On November 28, 1966, the United States District Court for the District of Colorado granted the motion to dismiss, concluding that "It was a matter wholly within the discretion of the Defendants whether Plaintiff's contract would be renewed or allowed to terminate."

On May 19, 1969, the United States Court of Appeals for the Tenth Circuit, *en banc,* affirmed with two judges dissenting. *Jones* v. *Hopper,* 410 F.2d 1323 (1969). It appears convincingly that the decision to affirm was based solely on the (mistaken) proposition that a public employee aggrieved by the *nonrenewal* of his con-

tract has no sufficient "property interest" or "expectancy" in "future" employment as to be protected from discriminatory treatment which would otherwise be in violation of the First and Fourteenth Amendments. The court evidently believed that a crucial difference exists between one who is discharged within the term of a contract for reasons disallowed by the First Amendment, and one whose contract is simply not renewed. Thus, it sought to distinguish the case of *Bomar* v. *Keyes,* 162 F.2d 136 (2d Cir.) (Opinion by Learned Hand), *cert. denied,* 332 U.S. 825 (1947), *rehearing denied,* 332 U.S. 845 (1948), in which a similar claim by a probationary employee had been upheld, insisting that Plaintiff in *Bomar* had an "interest stemming from-[a] contract," while Jones, whose contract had come to an end, complained only of discriminatory nonrenewal. 410 F.2d at p. 1327. The majority concluded (*id.* at 1328):

> Therefore, we can find nowhere in the complaint an allegation of any identified interest which is secured by the Federal Constitution or laws.

At another point, the Opinion appears to go even further, quoting approvingly from a state court decision that (*id.* at 1328):

> [A]bsent an applicable statutory or contractual provision to the contrary, an employer enjoys an absolute power of dismissing his employee, with or without cause.

The dissenting Opinion (by Judges Seth and Holloway) similarly characterizes the majority's holding as suggested above (*id.* at 1330):

> The majority bases its opinion on the proposition that there was no "expectancy" of further

employment, and thus the plaintiff had no "interest" to be protected by the First Amendment to entitle him to relief. The majority finds no "expectancy" by referring to the statutory powers of the trustees of the school to hire and fire . . . and states that:

> "The provision specifically denies an expectancy to continued employment; therefore, *absent such an expectancy, there could be no interest.*" [Emphasis added.]

The dissent then proceeds to express the basis of its disagreement with the majority, noting (*id.* at 1331):

> The position of teachers relative to various supervisory boards has been the subject of many recent court decisions, and it would serve no purpose to develop the point here. [Citations to Pickering v. Board of Education, 391 U.S. 563; Keyishian v. Board of Regents, 385 U.S. 589; Wieman v. Updegraff, 344 U.S. 183, and other decisions in which this Court has protected constitutional rights of public employees.]
>
> . . . .
>
> The Board certainly has broad discretion over the teaching staff and administrators, and is charged with the duty of operating the school in an orderly, effective, and professional manner.
>
> . . . .
>
> But no matter how broad their discretion may be by statute or by custom it cannot be used to deprive teachers of their constitutional rights. This is what plaintiff has alleged, and this is sufficient. Whether he can prove it is indeed another matter, and *a matter which has not yet been reached in this case.* [Emphasis added.]

To secure review of the holding by the majority, Petitioner seeks a Writ of Certiorari.*

ARGUMENT OF REASONS FOR GRANTING THIS WRIT

We believe that the decision below is clearly incorrect, that it conflicts with many decisions of this Court, and that it utterly misapprehends the scope of the First and Fourteenth Amendments and of 42 U.S.C. § 1983. *Pickering* v. *Board of Education,* 391 U.S. 563, 568 (1968): "To the extent that the Illinois Supreme Court's opinion may be read to suggest that teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work, it proceeds on a premise that has been unequivocally rejected in numerous prior decisions of this Court." *Sherbert* v. *Verner,* 374 U.S. 398, 404 (1963): "It is too late in the day to doubt that the liberties of . . . expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." *Wieman* v. *Updegraff,* 344 U.S. 183,

* We have been at pains to review the exact nature of the only issue clearly decided in the court below in deference to the settled practice of this Court not to consider issues prematurely, in advance of their resolution by a lower court. Thus, we believe that the Petition for a Writ of Certiorari should appropriately be granted in respect of the question as we have stated it. An examination of the full opinion by the Court of Appeals may suggest, however, that the court in some sense intimates that it also decided the separate question of whether Plaintiff's utterances which formed the basis for his termination were, under the circumstances, within the protection of the First Amendment. (See especially, 410 F. 2d at 1328.) We do not believe that the Court of Appeals either intended to or did in fact decide that question, but if this Court were to conclude otherwise then we would urge that it extend the grant of certiorari to consider that issue as well.

192 (1952): "We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory." *Slochower* v. *Board of Higher Education*, 350 U.S. 551, 555 (1956): "To state that a person does not have a constitutional right to government employment is only to say that he must comply with reasonable, lawful, and nondiscriminatory terms laid down by the proper authorities."

The more compelling reason to grant the petition (and summarily to reverse if, as we believe, further briefs and arguments would be unnecessary in this case), however, is to avoid future misunderstanding by other courts and to avoid the chilling effect of insecurity which must be endured by literally thousands of other persons—an effect which must necessarily ensue—if the distinction maintained by the court below is allowed to stand. The court below recognized that Petitioner's complaint would have stated a claim entitling him to relief had it alleged that he had been discharged *during* the term of his employment solely for reasons violative of the First and Fourteenth Amendment. Unable to perceive any "interest" or "expectancy" injured by one who is discriminatorily treated in the *nonrenewal* of his public employment on identical grounds, however, the court purported to find a distinction which implies that governmental entities may refuse to hire, to rehire, or to give equal consideration for improvement in the current status of any person subject to their review solely from disapproval of the manner in which that person may have exercised his freedom of speech.

The source of the error below is understandable, namely, that the court discerned the issue to be whether the Petitioner had any "right" to future employment by the state. But the issue is, of course, not whether he has a "right" to future employment without regard to his qualifications, but whether he has a right to freedom of speech unabridged by discriminatory state action in the exercise of control over critical opportunities in the public sector. If, as Petitioner alleged (and as both courts below admitted to be true in passing upon the motion to dismiss), the *sole* reason for the nonrenewal of his public employment was from disapproval of his constitutionally protected utterances, his exclusion was *a fortiori* pursuant to standards "patently arbitrary or discriminatory" and just as forbidden to the state as though the decision to terminate him (or not to hire him) had been made solely because of his race, his political affiliation, or any other constitutionally invidious criterion. *Wieman* v. *Updegraff,* 344 U.S. 183 (1952). (It is significant, in comparison, that Keyishian, one of the successful plaintiffs in *Keyishian* v. *Board of Regents,* 385 U.S. 589 (1967), was himself a nonrenewal, rather than a dismissal, case, and that the successful plaintiff in *Whitehill* v. *Elkins,* 389 U.S. 54 (1967), which similarly involved issues of academic freedom, was actually a job applicant; compare also *United Public Workers* v. *Mitchell,* 330 U.S. 75 (1947), where this Court acknowledged that job applicants are equally to be protected as job holders, from exclusion pursuant to constitutionally invidious criteria.)

A denial of the Petition in this case would, accordingly, leave at large an erroneous but seemingly authoritative court of appeals decision of chilling consti-

tutional effect. The avoidance of that stultifying effect and the avoidance of future controversies of a similar nature are, we believe, substantial reasons for granting the Petition. Since the case does not, in its current posture, fairly raise any other issue (such as whether Petitioner's utterances solely accounting for his termination were within the protection of the First Amendment as alleged by him) we believe that summary reversal and remand to the district court may be appropriate.

Respectfully submitted,

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MOTION FOR LEAVE TO FILE AND BRIEF OF THE NATIONAL EDUCATION ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE PETITION

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